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NEWSLETTER

Notice of Circumstances Was Too General to Satisfy Policy

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A federal district court in Illinois has held that a policyholder failed to provide sufficient notice of circumstances that could potentially give rise to a claim to trigger coverage under a D&O policy where the policyholder informed the insurers that it was "contemplating" filing for bankruptcy and expected claims to be filed against its directors and officers. *Chatz v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2007 WL 1119282 (N. D. Ill. Apr. 12, 2007).

Three insurers issued primary, first-layer excess and second-layer excess D&O policies to a high-tech company for the period from October 8, 2000 to October 8, 2001. The primary policy provided that if the insured became aware of "any circumstances which may reasonably be expected to give rise to a Claim being made against the Insureds" and provided written notice of those circumstances "with full particulars as to dates, persons and entities involved" to the insurer within the policy or discovery period, then any claim subsequently made against the insured that arose out of those circumstances "shall be considered made at the time such notice of such circumstances was given."

In July 2001, the company filed for relief under chapter 11 of the Bankruptcy Code. The bankruptcy case was converted into a chapter 7 case in November 2001. Shortly before filing for bankruptcy, an officer of the company sent a "notice of circumstances" letter to its broker indicating that the company: (1) was "contemplating" filing for bankruptcy, (2) "believe[d] that such filing will give rise to claims being filed against the Company, its Board and Officers," and (3) would "advise [the broker] of the specifics" as it became aware of them. The broker forwarded the letter to the insurers. The primary insurer advised the company that its letter did not constitute adequate notice under the terms of its policy because it did not set forth any particulars about the circumstances that could give rise to a claim. The excess insurers also rejected the letter as insufficient notice. The company never provided any additional information to the insurers before the policies expired.

The bankruptcy trustee filed an adversary complaint against certain of the company's directors and officers. The insurers denied coverage on the grounds that the notice was inadequate and a claim was not made against the insureds during the operative policy period. The trustee then filed the instant coverage action against the insurers. The bankruptcy court granted the insurers' motion for summary judgment in an opinion

summarized in the September 2006 issue of *Executive Summary*.

On appeal, the district court affirmed the bankruptcy court's holding that the purported "notice of circumstances" letter was insufficient notice under the Policy. The court reasoned that "[t]he express requirement in [the Policy] that information be provided 'with full particulars' makes it clear that [the policyholder] could not satisfy the notice requirement with vague and general catchall statements about possible claims." The court noted that the officer who submitted the purported notice of circumstances "acknowledged in his letter that he lacked knowledge concerning the specific facts involved in the potential claims" by stating that the company would advise the insurers "of the specifics of the claims as the Company becomes aware of them." The court further held that simply listing the directors and officers of the company and noting that the company might file for bankruptcy were not "full particulars" with respect to persons and entities because it would be "self evident" to the insurers that any claim under the policies would involve the company's directors and officers as well as the company.

The court, however, reversed the bankruptcy court's holding that a Florida notice statute, which precludes an insurer from denying coverage "on a particular coverage defense" unless the insurer asserted the defense within 30 days of learning of it, did not apply in this instant action. The court reasoned that the insurers' "position is unquestionably a coverage defense" because the company's failure to provide a sufficient notice of circumstances "is a basis that Insurers contend provides a justification to deny coverage over a matter that is covered under the D&O Policies." The district court remanded the case so that the bankruptcy court could determine whether Florida law or Illinois law applied and, if Florida law applied, whether the insurers had waived their defense by waiting more than 30 days to raise it.